IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

JAMAICA WATER SUPPLY COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	No.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 125 Fed. (2d) 512. The opinion of the Board of Tax Appeals is reported in 42 B. T. A. 359. (R. 35-43)

Specification of Errors.

1. The decision of the Circuit Court of Appeals is erroneous in that

(a) The money received was income for the years in which earned.

(b) In the alternative, the money received was income in the year of payment.

(c) The imposition of the tax is unjust and inequitable.

Argument.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and the Circuit Court of Appeals.

The petitioner is on the accrual basis. It furnished water to the City of New York. Under the City's charter the City was required to pay just and reasonable compensation for the service rendered. The petitioner regularly billed the City at the rate of $45.00 per hydrant but the City paid only $18.00 per hydrant. Finally the petitioner brought suit and the matter was compromised by the City's agreement to permit judgment to be entered for the billed amount for the years as to which collection was not barred by the statute of limitations. The Board of Tax Appeals and the Court below held that the money collected was income, not when earned, not when collected, but in the year when judgment was entered.

The case is squarely within the rule of the Federal Control cases. *Continental Tie & Lumber Company* v. *United States*, 286 U. S. 290; *Commissioner* v. *Old Dominion S. S. Co.*, 47 Fed. (2d) 148; *Helvering* v. *St. Louis Southwestern Ry. Co.*, 66 Fed. (2d) 633; *New York Central Railroad Co.* v. *Commissioner*, 79 Fed. (2d) 247; *Commissioner* v. *Midland Valley R. Co.*, 57 Fed. (2d) 1042; *Helvering* v. *Gulf M. & N. R. Co.*, 71 Fed. (2d) 953. These cases hold that where the obligation to pay the reasonable value of services is fixed by law and "nothing remains to be determined at the close of the year except the amount of just compensation on the basis of past facts and established principles" the amount collected after the settlement or adjudication of a controversy as to the amount, is income for the years in which it was earned. In *Continental Tie & Lumber Co.* v. *United States, supra*, it was held that a payment made to the

taxpayer, also on the accrual basis, constituted income in 1920 when the right to additional payment was created by statute and not in a subsequent year when the award or the payment was made. The amount was held to be income for the year when the right to receive some payment was fixed and not in the year of award or payment.

The rule of the Federal Control Cases should no longer be confusing. In *Helvering* v. *St. Louis Southwestern Ry. Co.*, 66 Fed. (2d) 633, cert. denied 292 U. S. 626, Judge Stone segregated the then existing cases into two classes (1) those dealing with situations where there was "some dispute as to any liability or where the liability is contingent upon future happenings" and (2) "those where there is no contest over liability, and where the amount of the liability does not depend upon future events or contingencies". Judge L. Hand, in his dissenting opinion, in *Commissioner* v. *Brooklyn Union Gas Co.*, 62 Fed. (2d) 505, tersely classified the situations into (1) those dealing with "the determination of a disputed right" and (2) those dealing with "the liquidation of a determined right." No recent case, except the instant case, has been found which has not recognized the classifications pointed out by Judge Stone and Judge Hand and imposed tax accordingly. In *New York Central Railroad Co.* v. *Commissioner*, 79 Fed. (2d) 247, the Court said, "The compensation was earned when the services were performed, and no uncertainty existed except as to what was a fair and reasonable amount."

The Court below viewed this case as one where there was "some dispute as to any liability or where the liability is contingent on future happenings", *i. e.*, one involving "the determination of a disputed right." It overlooked the fact that in the Federal Control cases the uncontested part was paid as earned. *Commissioner* v. *Midland Valley R. Co.*, *supra*, and *Baltimore & O. R. Co.* v. *Commissioner*, 78 Fed. (2d) 456. There as here, the liability to pay was fixed by law and only the amount of

the liability remained to be determined. Partial payment does not make it a case involving "the determination of a disputed right." The petitioner asserts that this case should be classified with "those where there is no contest over liability, and where the liability does not depend upon future events." It involves "the liquidation of a determined right." "Nothing remains to be determined at the close of the year except the amount of just compensation on the basis of past facts and established principles" and accordingly the amount paid was income for the years in which earned.

2. The decision of the Circuit Court of Appeals is erroneous because

(a) The money was income for the years in which earned.

True for the reasons urged in (1) herein.

(b) The money was income in the year of receipt.

The petitioner contends, in the alternative, that the respondent should have followed Article 331 of Regulations 77 (Rev. Act 1932), the material part of which reads as follows:

> "If a person sues in one year on a pecuniary claim or for property, and money or property is recovered on a judgment therefor in a later year, income is realized in that year, assuming that the money or property would have been income in the earlier year if then received."

Here the money was not "recovered" in the year for which the respondent proposes to include it in gross income.

(c) The imposition of the tax is unjust and inequitable.

In the proceeding before the Board of Tax Appeals the respondent pleaded estoppel in his answer. The petitioner in its reply alleged that even if the amount paid

by the City had been added to its income for the years in which earned, a true and correct computation of tax for such years would show little if any tax due. At the trial before the Board, the respondent withdrew the defense of estoppel. Without more, and there is no more in the record, the petitioner may not say to this Court that it has already paid substantially all the tax due if the income here involved had been properly accrued as earned, but the inference to be drawn from the withdrawal of the plea of estoppel is obvious.

Conclusion.

We submit that the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and the lower courts; is contrary to the income tax regulations; and is unjust, erroneous and inequitable, and that if such decision is not reversed confusion will result. We respectfully submit that the petition for certiorari should be granted.

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